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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-491

UNITED STATES OF AMERICA,

Petitioner,

v.

LINDA AGURS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

QUESTIONS PRESENTED

I. In a murder case involving the defense of self-defense, may the federal prosecutor, consistent with the defendant's due process rights, withhold a record of criminal convictions of the dead person showing his propensity for violence, admissible evidence of a high degree of materiality, when that record is in the prosecutor's file, and he has led the Court and defense counsel to believe that an informal agreement would

bring about the disclosure of such information if it existed?

II. Whether, when an indigent defendant claims self-defense to a charge of second degree murder, the failure of court-appointed trial counsel to seek to discover by specific request the deceased's criminal record, to research the applicable local law of character evidence, and to investigate the character of the deceased, denies a defendant the effective assistance of counsel provided by the Sixth Amendment?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No personal shall be * * * deprived of life, liberty or property, without due process of law * * *.

The Sixth Amendment to the United States Constitution provides, in pertinent parts:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.

28 U.S.C. § 2106 (1970) provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF FACTS

Respondent is satisfied to rely in general on the statement of the facts of this case as set out in the opinion of the Court of Appeals. However, certain parts of the Government's statement of facts require clarification and reply.

Respondent was convicted of the second-degree murder of James Sewell who died of knife wounds inflicted with his own knife. Respondent's sole theory of defense was that she acted in self-defense when Mr. Sewell advanced upon her with a knife in a locked motel room where they were alone. The Government's theory of the case was that respondent assaulted Mr. Sewell when he returned from a visit to the bathroom down the hall and saw her apparently looking for money. (A. 120-21). A central issue of this case as it comes before this Court revolves around the prosecutor's pre-trial withholding from defense counsel of a record of the decedent's criminal convictions for knife related offenses, including a 1963 conviction for assault and carrying a deadly weapon and a 1971 conviction for carrying a deadly weapon. (A. 145).

During a pre-trial interview with a witness, Mr. Robert Gaston, the trial defense counsel, was told that the dead person might have a criminal record. (A. 160). Defense counsel did not formally press the matter after he came to the erroneous conclusion that the criminal convictions would not be admissible in evidence since his client told him she was unaware of them. (A. 160). Defense counsel has admitted doing no actual research himself on the admissibility question. (A. 160). Rather he was satisfied to rely on an off-hand opinion of a lawyer in no way associated with him. (A. 160). The

older lawyer did suggest that Mr. Gaston consult a case (A. 160) which, if shepardized, would have produced the precedent that Mr. Gaston could have used to argue that the criminal convictions were admissible. However, defense counsel submitted an affidavit, part of the record in the Court of Appeals, which states that it was his belief that an informal discovery arrangement had been worked out which would have produced any existing criminal record of the decedent. (A. 191). "[T]he assistant United States Attorney never presented the decedent's prior criminal record to me as I expected he would if such did in fact exist." (A. 191).

Defense counsel also attempted to enter into a formal discovery stipulation but was induced not to insist on that procedure by the trial judge who assured him that it was not necessary. The trial judge told defense counsel that the United States Attorneys were always cooperative on discovery matters.[1] The record discloses the following colloquy:

> MR. GASTON: As I stated earlier, I had a rather lengthy discussion with Mr. Clarke and we have reached a substantial agreement as to discovery matters, and I was wondering whether we might place that agreement on the record at this time.
>
> THE COURT: If it is necessary. Have you had all of the discovery you want?
>
> MR. GASTON: Well, not all, Your Honor, primarily because Mr. Clarke does not have it all in his possession at this time, such as photographs

[1] The trial practice of the district Court requires that defense counsel participate in informal discovery proceedings before filing a formal discovery motion. See Local Rule 2-5(9), United States District Court for the District of Columbia (1973), reproduced *infra* in Appendix A.

> and things of that nature, physical evidence. But he has indicated his willingness to turn them over to me upon his receipt.
>
> THE COURT: It has been this Court's experience we have never had a problem in that regard. (A. 10).

Nothing in the record of this case tends to support the conclusion that the prosecuting attorney was under a genuine misunderstanding with regard to the admissibility of the decedent's record of convictions. It is to be noted that the defense counsel's erroneous belief rested upon both a misapprehension of the legal principle and knowledge of the facts given him by respondent that she did know anything about those convictions. In contrast, the prosecutor had not claimed to have believed in good faith that the record of criminal convictions was inadmissible altogether, irrespective of the state of the defendant's knowledge concerning those convictions. And the record does not show that the prosecutor had any information with respect to the state of the defendant's knowledge on that point. The record discloses that the prosecutor did know Mr. Sewell had been separated from his wife so that the prosecutor could well have thought that Mr. Sewell and the defendant met frequently in the manner revealed by the facts of the instant case. (A. 22). In addition, the record does not show that the prosecutor had any knowledge that the defendant would not testify on her own behalf at the trial. Had she done so she would have been able to testify as to her knowledge concerning the decedent's propensity for violence, if indeed the prosecutor believed defendant's knowledge to be an essential precondition of admissibility. The record does not support the contention that he had any information on that point or tried to get it.

The Government's assertion of the prosecutor's reason for withholding Sewell's conviction record is not supported by the record. At page 6 of its brief, the Government asserts "the prosecutor shared defense counsel's belief that, under applicable precendents at the time of trial, the record of decedent's prior convictions was not admissible unless respondent had actual knowledge of these incidents," citing A. 148. The passage on that page, however, supports no such conclusion. Significantly, that citation is not to sworn testimony (the Government never offered the trial prosecutor's testimony) but to oral argument of the prosecutor on the motion for a mistrial. Even accepting it as part of the record, it says only "there was nothing in this case which indicated to the prosecution that the record of the decedent was in any way favorable or usable by the defense in this case." The prosecutor did not say that he misapprehended the law and, with Mr. Gaston, believed admissibility was foreclosed unless Ms. Agurs knew Mr. Sewell. Nor does he ever state that the Government knew that Ms. Agurs was unacquainted with Mr. Sewell and, if so, the source of that knowledge.

The remainder of the passage seems simply to suggest that the prosecutor would have argued inadmissibility if the records were offered, which is different from deciding the admissibility issue by nondisclosure.

Nor does the record show that the prosecutor ever offered any explanation why the conviction record was

so readily found in a prominent place in his file in the post-trial search.[2]

The record of this case is entirely consistent with the conclusion that the prosecutor knew he was in possession of admissible evidence damaging to the theory of his wholly circumstantial case, and strongly in support of the defense theory of self-defense, or at least highly likely to influence the jury's assessment of the degree of guilt. The record is therefore consistent with the conclusion that faced with that situation the prosecutor decided to "stonewall" on the matter.

About three months after Ms. Agur's conviction, Mr. Gaston (A. 161) read the court of appeals' decision in *United States v. Burks*, 470 F.2d 432 (D.C. Cir. 1972), which characterized the admissibility of evidence of past violent acts of the victim in cases where self-defense is raised as "long-recognized." Mr. Gaston immediately sought out the Assistant United States Attorney who prosecuted the case and finding him not in his office, asked another Assistant United States Attorney if the decedent had a criminal record. (A. 162). The two of them then located the case file and found the two knife-related convictions close to the front of the folder. (A. 162). The importance to the defense of these two convictions comes from the unique factual setting of this death. The altercation

[2] At page 32 of its brief, the Government argues that the prosecutor's file "contained a myriad of factual material," citing A. 162. The passage on that page does not contain a reference to a "myriad" of factual material, but rather Mr. Gaston's recollection that, in addition to the records of the two convictions of Mr. Sewell that had been admitted there were others, including "convictions for assault with a dangerous weapon and assault on a police officer" which the Government later disputed. (A. 162, § 115.)

which resulted in Sewell's death began behind a closed motel room door. (A. 32). There were no witnesses to the events preceding or occurring contemporaneously with the attack. But some time after the two had entered the room, three persons, all motel employees, testified that they heard a woman screaming for help, that they rushed to the door called out, heard another scream, and one of them broke down the door. (A. 32, 52, 88). The witnesses agree that when they entered the room the decedent was sprawled on top of Ms. Agurs attempting to jam the knife into her chest. (A. 32, 55, 88).

One witness did say that the decedent had his hands on the blade of the knife and that Ms. Agurs had hers on the handle when that person burst into the room. (A. 37, 38). However, another witness contradicted that theory, (A. 70) and a third, coming in the same door, said it was not possible for him to see how the parties hands were positioned. (A. 89). The motel employees wrestled Mr. Sewell off of the defendant and were able to disarm him. (A. 42). Mr. Sewell was taken to a hospital shortly thereafter where he later died (A. 62). Respondent voluntarily turned herself in the next day, was indicted and convicted of second-degree murder. (A. 105).

PROCEDURES BELOW

Following defense counsel's discovery of decedent's criminal record, he moved the trial court for a new trial on the dual bases of newly discovered evidence – the two criminal convictions – and the prosecutor's failure to disclose them, as was required under *Brady*. That

motion was denied, (A. 163), and Mr. Gaston subsequently filed a motion in the Court of Appeals to have himself removed from the case so that substitute counsel could raise the ineffective assistance of counsel issue. (A. 163). Substitute counsel was appointed and asked the trial court for a new trial on the grounds the defense counsel's failure to investigate his case and research the law, and his consequent failure to introduce the criminal record into evidence, constitutionally prejudiced Ms. Agurs. The trial court denied that motion, and an appeal was taken on both the *Brady* issue and the ineffective assistance of counsel claim, and the court of appeals reversed the conviction.

The Court's opinion notes, *inter alia*, that the case could not be characterized as one involving the absence of a defense request for the suppressed evidence. However, the opinion stresses the high degree of materiality of the evidence as "a much more significant factor" than either prosecutorial misconduct or defense neglect. The Court of Appeals held that the evidence of the decedent's propensity to carry and use a knife was of such significance on the issue of who was the aggressor to support the conclusion that Ms. Agurs was denied a fair trial.

SUMMARY OF ARGUMENT

The Court of Appeals decision reversing Respondent's conviction should be affirmed. All of ingredients are present in this case of a violation of the duty of the prosecution to disclose exculpatory material to the defense. The suppression was not inadvertent but a knowing one. The prosecutor was alerted to his

obligation to disclose exculpatory material by informal discovery proceedings. The existence and probative value of the evidence were plain, its admissibility clearcut. Nothing in the record provides justification or excuse for the suppression. The most plausible inference is that the prosecutor suppressed the evidence simply because it hurt his case.

An explicit request for the precise evidence suppressed should not be made a prerequisite to the grant of a new trial where the existence of the evidence is known to the prosecutor and its probative value is more than insignificant. Informal discovery procedures were undertaken to call the attention of the prosecutor to his duty to disclose positive evidence tending to acquit.

The decision of the Court of Appeals was based upon a sound test, especially appropriate to the facts of this case, respecting the materiality of the evidence. The Court concluded that the evidence might have led the jury to entertain a reasonable doubt.

The Court's assessment of the probative value of the evidence of the decedent's convictions of violent crimes, including knife-related crimes, was entirely sensible and cogent. The suppressed evidence had a high degree of probative value, in a completely circumstantial evidence case, on the central issue—who was the aggressor.

Substantial differences exist between this case and *Moore v. Illinois*, 408 U.S. 786 (1972). The prosecutor in this case was not blameless, as was true in *Moore*. The evidence unavailable to the defense in *Moore* was characterized as insignificant. The Court of Appeals has found the evidence in this case to possess a high order materiality. This case and *Moore* differ markedly in their evidentiary contents. *Moore* involved strong direct evidence of guilt. Respondent was convicted in this case by purely circumstantial evidence.

The Government has the burden of demonstrating that the Constitutional violation was mere harmless error beyond a reasonable doubt. That means the Court must be convinced beyond a reasonable doubt that the jury would have reached the same result if the suppressed evidence had been available in its deliberations.

I.

THE DECISION OF THE COURT OF APPEALS REVERSING RESPONDENT'S CONVICTION SHOULD BE AFFIRMED ON THE GROUND THAT RESPONDENT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTION'S NON-DISCLOSURE OF EXCULPATORY EVIDENCE.

A. The Duty to Disclose Exculpatory Evidence – General Argument.

Respondent submits that the Constitutional rights to due process and a fair trial presumptively entitle an accused person to all exculpatory information in the possession of the Government. Due process dictates no less a first principle than that the Government is under an affirmative and demanding responsibility to turn over to the defendant evidence which will tend to acquit.[3] The interest of the Government is to insure the

[3] That such an affirmative duty on the prosecutor's part is appropriately imposed is indicated in the American Bar Association's Standards Relating to Discovery and Procedure Before Trial, Approved Draft, Sec. 2.1(c) (1970), and the American Bar Asosciation's Standards Relating to the Prosecution and Defense Function, Final Draft, Sec. 3.11(a) (1971). The former standard was cited favorably by the Supreme Court in *Giglio v. United States*, 405 U.S. 150 (1972).

emergence of truth at trial. "No respectable interest of the State is served by concealment of information which is material, generously conceived, including all possible defenses." *Giles v. Maryland*, 386 U.S. 66, 98 (1966) (Fortas, J., concurring).

Subsequent to the trial of the present case defense counsel learned that during the course of the trial the prosecutor was in possession of evidence showing that the decedent, James T. Sewell, had been convicted several times for violent crimes. The convictions included two crimes involving knives. That police record was found after a perfunctory search of the prosecutor's trial file. The admissibility of the evidence on behalf of the Respondent at her trial is not disputed. In reversing Respondent's conviction, the Court of Appeals emphasized the materiality of the evidence as the decisive consideration. The Court found that the suppressed evidence had a high order of materiality both as to guilt and as to the degree of the crime and could have altered the outcome of the trial. The decision of the Court of Appeals conforms to the holdings of *Brady v. Maryland* 373 U.S. 83 (1963) and *Moore v. Illinois*, 408 U.S. 786 (1972). The analysis of the Court of Appeals is faithful to the formula for decision set forth in *Moore* which catalogues the various factors requiring evaluation. The cases which have dealt with those factors in the most insightful manner support the result and reasoning of the Court of Appeals.[4]

[4] *Giglio v. United States*, 405 U.S. 150 (1972); *Giles v. Maryland*, 386 U.S. 66 (1966); *Evans v. Janing*, 489 F.2nd 470 (8th Cir. 1973); *United States v. Hibler*, 463 F.2nd 455 (9th Cir. 1972); *Keogh v. United States*, 391 F.2nd 138 (2nd Cir. 1968); United States ex rel. *Meers v. Wilkens*, 326 F.2nd 135 (2nd Cir. 1964); *Griffin v. United States* 183 F.2nd 990 (D.C. Cir. 1950).

B. An Evaluation of the Respective Factors Favors Respondent on Each Particular.

Respondent acknowledges that the Constitutional principle advanced here is not capable of the simplistic declarative that a defendant is entitled to a new trial upon a showing that evidence was undisclosed which was in the possession of the Government and which could have been helpful to the defense. A complex set of factors must enter into a statement of the duty to disclose. But a definition of a Constitutional right should not be reduced to a test, of any number of "prongs," for mechanical application to a set of facts.

Respondent submits that an evaluation of the respective Moore criteria points in each particular to a result in her favor. No complex balancing must be undertaken. Perhaps the most comprehensive and cogent discussion of the analytical framework for cases of this kind is found in *United States v. Keogh* 391 F.2nd 138 (2nd Cir. 1968). The instant case fits into Judge Friendly's category of "easy cases," that is, those involving a deliberate suppression in the sense of a failure to disclose evidence whose high value could not have escaped the attention of the prosecutor. Therefore, this is a case which presents a minimal problem with respect to the degree of prejudice which must be shown to warrant a new trial. Notwithstanding, the Court of Appeals found that the suppressed evidence had in fact a high probative value. Its denial was severly prejudicial.

a. The Suppression Was Not Inadvertent

The record in this case does not support a conclusion that the suppression of the evidence by the prosecution was inadvertent. The opinion of the Court of Appeals notes the fact that the prosecutor was aware of the existence of the withheld evidence. No contention has ever been made that the suppression was inadvertent. The Petitioner's Brief points to no support for such a contention. Petitioner refers us to the Prosecutor's statement that he was prepared to resist the introduction into evidence of the decendent's criminal convictions. (A. 164). The implications of this position should be carefully noted. it is an admission that the evidence was on the prosecutor's mind and that it was damaging to his case. The prosecutor never has contended 'that he thought that the evidence was not material. Nor is his position that the evidence was inadmissible, only that he would resist its introduction. Even that position must be carefully scrutinized. In order to make any plausible argument against admissibility of a record showing that the decendent had been convicted of violent crimes, the factual premise had to be that the defendant had no knowledge of them. Of course, it is clear that under the prevailing the evidence would be admitted. But the point is that the record of this case nowhere shows that the prosecutor has any knowledge or has ever claimed to have any knowledge of the defendant's state of mind.

Respondent submits that the most plausible inference is that the prosecutor knew full well he had possession of evidence damaging to his case and helpful to the defense and that he decided to withhold that evidence. The further inference is that he did not merely regard it

as not material after the exercise of due diligence because it was not admissible. Moreover, while no explicit request for that specific evidence was made by the defense, discovery was undertaken which should have alerted the prosecutor to his strict obligation to disclose that evidence which was highly probative on the only conceivable defense theory. Condonation of the prosecutor's behavior in this case should not be forthcoming from this Court.

b. Materiality

Even if we were to assume for the sake of argument a justifiable failure on the part of the prosecution to apprehend the value of the evidence to the defense, and assuming the absence of even the functional equivalent of a request, the present case would still call for a finding of a due process violation because the evidence unavailable to the defense and in the prosecution's possession has such a high probative value. That evidence was found by the Court of Appeals to have the potential to alter the result of the first trial.

The Court of Appeals concluded that the suppressed evidence "might have led the jury to entertain a reasonable doubt." (510 F.2nd at 1253). That is an appropriate verbal formulation[5] of the test governing

[5] Semantical differences exist in the materiality adopted to define what level should be present before reversal under *Brady* is mandated. In *United States vs. Giglio* a "reasonable likelihood" standard was employed 405 U.S. at 154. In *Brady v. Maryland* the question was whether the evidence "would tend to exculpate" the defendant. "373 U.S. at 88. The court below inquired whether the evidence "might have led the jury to entertain a reasonable doubt." (510 F.2nd at 1253).

the degree of materiality necessary for a reversal of the conviction in this case. That text excludes the trivial or insignificant, but it accords the jury its proper role, and the role defendant has a Constitutional right to have the jury exercise, that of evaluating the probative value of the evidence. Respondent has an especially strong claim to have a jury assess the weight of the suppressed evidence given the facts surrounding the suppression.

The prosecutor was trying a murder case where the only imaginable defense was self-defense. The issues were not complex and the evidence hardly voluminous. Doubtless by an instinctive perception of the materiality of such evidence, the prosecutor investigated and uncovered a record of criminal convictions of the dead person. The offenses included a brazen attack upon a police officer. The accused person was a woman, small in stature. The decedent was carrying a frightening weapon at the time of his death, and the defendant was unarmed. The evidence in the case was entirely circumstantial. The prosecutor had to persuade the jury beyond a reasonable doubt that the circumstantial evidence would convince them that the defendant did not act in self-defense. No evidence introduced at trial indicated the defendant was violence prone. The criminal record, then, was powerful evidence against the prosecution. Respondent had only one defense, that her actions were justified because Mr. Sewell was the aggressor in their altercation. The jury was apprised of the fact that the decedent carried a knife. However, the belief may have been formed that he was only defense-minded since he did frequent taverns where trouble could erupt. The Respondent was an easy target for the prosecutor's assertions that she was a would-be thief in the incident which led up to the death. There

was an easily-spun theory that the decedent interrupted the defendant's rifling of his wallet. If the jury had known of decedent's criminal record, they could have been much more easily persuaded to doubt that trite scenario. The jury would have been much less likely to cast the Respondent as the aggressor and they could as easily have been persuaded that it was the decedent who had initiated a situation which caused the Respondent to take up the decedent's own knife in self-defense. The fact that the decedent was a person who would readily use a knife and not merely carry one would have made defense counsel's case much more persuasive and would have made all the difference in the world to the jury. As the Court of Appeals noted, absent his criminal record, the evidence was unclear on whether Mr. Sewell was the type of person who would assault another with a knife. For example, the desk clerk testified that Mrs. Sewell told him that her husband "would use a knife." She later denied making the statement. (510 F.2nd at 1254).

Here the jury not only might have found respondent innocent given the value of the new evidence, but it might also have convicted of the lesser included offense of manslaughter. The possibility of a reduction in penalty is also valid grounds for a reversal under *Brady*, 373 U.S. at 88, and *Giles*, 386 U.S. at 82.

Ample precedent, painstakingly analyzed by the Court of Appeals, exists to support the decision below on its finding of materiality.

The prosecutor's conduct here is strikingly similar to the behavior condemned in *Brady v. Maryland, supra*, where a co-defendant, was withheld. The conduct here also parallels the activity condemned in *Giles v. Maryland, supra*, a rape case in which the prosecution withheld evidence of the victim's sexual proclivities and

the issue was whether she consented to intercourse. A third case on point here is *Giglio v. United States, supra*, where the evidence not disclosed was a reduction of sentence that the Government offered its chief witness in return for his testimony.[6]

c. The Purpose and Function of a Request Were Met in This Case

Plainly a request cannot be made an invariable prerequisite for the conclusion that due process has been denied a defendant by the suppression of exculpatory evidence. Indeed, the cases show that to be a mere truism. Flagrant suppression cannot be justified or excused by the absence of a formal and explicit defense request. The function of a request in these cases is to enlarge the disclosure duty to cover cases where there is no showing of actual knowledge of the existence or possession of the exculpatory evidence by the prosecution, and also to cover cases where the utility of the evidence to the defense may not reasonably be appreciated by the Government through the exercise of due diligence. Where the prosecutor knows he has material evidence and the utility of that evidence is palpable, the reason for the request requirement is nonexistent. The Government should not be permitted to exploit neglect or ignorance of defense counsel.

The inherent and palpable materiality of the evidence in this case, performed the "flagging" function of an explicit request. The informal discovery procedures

[6] *Alcorta v. Texas*, 355 U.S. 28 (1957); *Levin v. Clark*, 408 F.2nd 1209 (D.C. Cir 1967); *State v. Williams*, 500 P.2nd 722 (Ct. App. Or. 1972).

satisfied the functional purpose of the request element of the *Moore* formula. Hence, an evaluation of the request criteria also favors Respondent unless it is to be treated as a purely formalistic requirement applied in a mechanical manner.

C. The Decision of the Court of Appeals is Consistent With Moore v. Illinois.

Moore v. Illinois expressly reaffirmed the obligation of the Government to disclose exculpatory material. The result in that case does not preclude an affirmance of the decision below. Moore turned on a special combination of factors much different from this case. The Supreme Court of Illinois had found no "suppression of material evidence." A majority of this Court agreed that the prosecution had been blameless as to the nondisclosure and found the undisclosed evidence to be insignificant. Pronounced factual differences exist in this case as to every analytical facet.

The significance of the evidence in Moore was a very close question as the sharp division of the Court attests. A witness, Sanders, testified that the defendant had stated to him after the killing that he had shot a bartender in Lansing, where the murder had taken place. Evidence in the hands of the State tended to show that Sanders had mistaken the defendant and one "Slick" Watts. The majority concluded that the undisclosed evidence was not significant on the issue of guilt, relying heavily on the fact that there was direct eyewitness evidence of guilt. A waitress identified Moore as the person who had been ejected from the bar earlier and who had returned and shot the bartender. A

patron testified that Moore was the person who entered and shot the bartender and that the witness had chased him until Moore turned and threatened to shoot him. The other evidence unavailable to the defense was a sketch of seating arrangements made by a police officer which the defense claimed confounded the testimony of the patron. The Court concluded that the diagram simply did not contradict the patron's testimony.

The Moore opinion stresses the direct evidence of guilt and the absence of an intentional suppression. The Dissenting Justices thought that the State's failure to disclose the evidence was the result of something other than inadvertence. They regarded the explanation for nondisclosure proferred by the State as disingenuous. The minority also believed that the undisclosed evidence might well have been of assistance to the defense. The low quality of the evidence and the prosecutor's forthrightness were, therefore, both vital in the result of that case. This case is much different.

The case presented against the Respondent was entirely circumstantial, and her sole defense was self-defense. Whatever tended to show the decedent's propensity for violence and for using knives cannot be dismissed as insignificant. A criminal record showing several convictions for violent crimes and including crimes involving knives would have strong probative value, as the Court of Appeals found. In only a very tenuous sense can that evidence be viewed as cumulative on the ground that the jury has some evidence to indicate that the decedent might have been the aggressor. The evidence of the decedent's violent crimes would not have opened up a whole new line of defense, it is true, but it was highly probative evidence on the question of who was the aggressor. The defense

was badly hurt by its absence. The defendant was entitled to have the jury assess the weight of that evidence. There was utterly no good reason for the defense not to have it. The prosecutor knowingly withheld evidence which was unmistakably damaging to his case and helpful to the defense.

The facts of Moore show an explicit claim of good faith by the prosecutor, the defense attorney himself had scoured the prosecutor's file and the response to discovery was adequate. In the instant case, no claim of good faith has been made and no basis for one exists. The record supports an inference of knowing suppression. The evidence was readily found in the prosecutor's file and its utility was palpable.

D. The Government's Strict Burden of Proof

A vital matter in the decision of this case is the Government's burden of showing beyond a reasonable doubt that the Constitutional violation was mere harmless error. The right to a fair trial may not mean a trial wherein, as a universal proposition, the defendant has the benefit of all evidence which might have been helpful. However, the undisputed fact of possession of exculpatory evidence by the prosecution makes a critical difference because due process is concerned with how the Government obtains a conviction. That is why the relative blameworthiness of the prosecution on the suppression issue is of such importance. And that is what distinguishes this case from mere newly-discovered-evidence cases.

This Court has admonished that "before a federal constitutional error can be held harmless, the court

must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Petitioner has not carried that burden in this case. It cannot be said, reasonably and non-dogmatically, that the jury would not reach a different result as to guilt or the degree of the crime if the jury had the record of criminal convictions of the decedent before it in its deliberations.

CONCLUSION

Respondent urges this Court not to disturb the decision of the Court of Appeals. That Court correctly identified the strong materiality of the undisclosed evidence as a compelling factor and its disposition of the case is supported by the facts relating to the blameworthiness of the prosecution as to the nondisclosure. The informal discovery procedures gave a clear signal to the prosecutor to conscientiously perform his duty to disclose "positive exculpatory evidence which would constitute a defense." *Levin v. Clark*, 408 F.2nd 1209, at 1216, n.2 (D.C. Cir. 1967) (Burger, J., Dissenting).

II.

RESPONDENT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HER TRIAL COUNSEL FAILED TO CONDUCT ADEQUATE FACTUAL AND LEGAL RESEARCH TO SUPPORT RESPONDENT'S CLAIM OF SELF-DEFENSE.

The Sixth Amendment of the Constitution guarantees every criminal defendant the right to assistance of counsel. *Gideon v. Wainwright*, 372 U.S. 335, 342-3 (1963). The right to assistance of counsel has been interpreted to mean the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970); *see Reece v. Georgia*, 350 U.S. 85, 90 (1955); *Glasser v. United States*, 315 U.S. 60, 70 (1942); *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

Although this Court has recognized a criminal defendant's right to the effective assistance of counsel, it has left the development of correlative standards and duties to the lower courts. *McMann, supra* at 771. Consequently, there is a conflict among the circuits with respect to the appropriate standard.

The majority rule, expressed in several different ways, provides that a criminal defendant has the right to counsel rendering reasonably competent assistance. *United States v. DeCoster*, 487 F.2d 1197, 1203 (D.C. Cir. 1973); *Moore v. United States*, 432 F.2d 730, 737 (3d Cir. 1970); *Coles v. Payton*, 389 F.2d 224, 226 (4th Cir. 1967); *King v. Beto*, 429 F.2d 221, 225 (5th Cir. 1970); *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974); *United States ex. rel. William v. Twomey*, 510 F.2d 634, 641 (7th Cir. 1974); *cert. denied*, 44 U.S.L.W. (Feb., 1976); *United States v. Jeffers*, 520 F.2d 1256 (7th Cir. 1975); (Stevens, J.), *cert. denied*, 44 U.S.L.W. 3399 (Feb., 1976).

The minority rule states that a criminal defendant is denied the effective assistance of counsel when the defendant's representation is so inadequate that the trial is a farce, sham, or mockery of justice, *Moran v. Hogan*, 494 F.2d 1220, 1222 (1st Cir. 1974); *United States v. Yarnishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *McQueen v. Swenson*, 498 F.2d 207, 214 (8th Cir. 1974); *United States v. Stern*, 519 F.2d 521, 524 (9th Cir. 1974); *Johnson v. United States*, 485 F.2d 240, 241 (10th Cir. 1973).

Some courts have refined these standards by adopting specific guidelines or duties to which trial counsel must conform in order to render effective assistance. One of these duties, relevant to this case, is trial counsel's responsibility to conduct appropriate factual and legal investigations. This duty has been recognized under the reasonable competence standard, *United States v. DeCoster*, 487 F.2d 1197,1203 (D.C. Cir. 1973); *Coles v. Payton*, 389 F.2d 224, 226 (4th Cir. 1967); *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970); and under the more stringent mockery of justice standard. *McQueen v. Swenson*, 498 F.2d 207, 216 (8th Cir. 1974).

Section 4.1 of the ABA Standards Relating to the Prosecution and Defense Function (App. Draft 1971) states the nature of this duty:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.

The Commentary to this section makes clear the importance of this duty: "Facts are the basis of effective representation."

With respect to trial counsel's responsibility to adequately research applicable law, the Commentary to Section 5.1 of the Standards states:

> The lawyer's duty to inform himself on the law is equally and often more important . . (than the facts)[7]

These Standards were adopted as general guidelines by the District of Columbia Circuit in *DeCoster, supra* at 1203.

Having established that trial counsel has the duty to make appropriate factual and legal investigations, we turn to the application of this duty to the facts of this case.

Respondent was denied the effective assistance of counsel because her trial counsel failed to do the following: (1) move to discover the criminal record of the deceased, James T. Sewell, under F.R.Crim.P.16 (A.10); (2) investigate the background of Sewell after having been informed of his possible violent character (A.159); and (3) research the evidence law of the District of Columbia Circuit with respect to the admissibility of a deceased's character to support a defendant's claim of self-defense (A.160).

The primary issue at respondent's trial was whether she or Sewell was the aggressor in the struggle that resulted in Sewell's death. Self-defense was the defense from the start and, therefore, the character of the deceased was obviously relevant from the beginning of

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[7] "To give adequate representation, an advocate must be intimately familiar with these recent developments (law and procedure) most of them deriving from case law." Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential To Our System of Justice?, 42 Fordham L. Rev. 227, 233 (1973).

the case. The record shows that Sewell was convicted in 1963 for assault with a dangerous weapon (knife) and in 1971 for carrying a dangerous weapon (knife) (A.151).

Although trial counsel's informal discovery agreement with the prosecution did not specifically include the criminal record of the deceased (A.10), counsel expected such material to be released. (A.191)[8] Respondent has previously argued that trial counsel's informal discovery request satisfied the *Brady* requirements. If the Court is to hold that this request did not comply with *Brady*, then it should follow that the failure of trial counsel to have made a more specific or formal request must amount to ineffective assistance of counsel. *United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C. Cir. 1973); *Coles v. Payton*, 389 F.2d 224, 226 (4th Cir. 1967). At the very least, competent counsel is obliged to take whatever procedural steps are necessary to avoid inadvertent waiver of his client's rights. *See generally* Bar Association of the District of Columbia, Young Lawyers Section, Criminal Practice Institute, Trial Manual 2.6, 4.6, 4.21 (1975).

Further, other than making an informal discovery request, trial counsel did not conduct an independent investigation into Sewell's background. While interviewing a witness two months prior to trial, trial counsel was told that Sewell might have convictions for knife assaults (A.159).

Trial counsel's failure to make these appropriate factual investigations may be explained, but not excused, by his inadequate legal research. Gaston

[8] This informal procedure complied with the District of Columbia District Court Rule 2-5(a) which prohibits formal discovery motions unless informal requests are unsuccessful.

conferred with a semi-retired, local, criminal lawyer who told him a deceased's criminal convictions were inadmissible when the defendant was not aware of them at the time of the crime (A.160). Trial counsel subsequently was told by respondent that she was not aware of Sewell's criminal record. (A.160). He did not pursue the matter further until reading a recent decision of the District of Columbia Circuit, *United States v. Burks*, 470 F.2d 432 (1975), which held that such evidence was admissible. (A.161).

However, trial counsel was told by the same criminal lawyer in a conversation discussed earlier to look at the 1950 case of this Circuit, *Griffin v. United States*, 183 F.2d 990 (A.160). If trial counsel had read and shepardized this case, he would have found authority for the admissibility of the deceased's criminal record, *Evans v. United States*, 277 F.2d 354, decided in 1960. This case relied on Griffin to hold that a deceased's violent character is admissible regardless of the defendant's knowledge thereof. *Id.* at 356. *Evans* was relied upon in *Burks, supra* at 437.

Thus, trial counsel's failure to adequately investigate the facts and law relevant to respondent's claim of self-defense constitutes a breach of duty. *United States v. Lucas*, 513 F.2d 509, 511, n.5 (D.C. Cir. 1975); *Beasley v. United States*, 491 F.2d 687, 691 (6th Cir. 1974); *Schaber v. Maxwell*, 348 F.2d 664, 665-6 (6th Cir. 1965); *Poe v. United States*, 233 F.Supp. 173, 175 (D.D.C. 1964) (Wright, J.), *aff'd* 352 F.2d 639 (D.C.Cir. 1965); *People v. Ibarra*, 60 Cal.2d 460, 464, 386 P.2d 487, 34 Cal.Rptr. 863 (1963) (Traynor, J.); *see Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962). Because the violent character of the deceased is highly relevant to the aggressor issue, the essence of

respondent's case, this breach of duty violates both the reasonable competence and mockery of justice standards. *See United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C.Cir. 1973); *Coles v. Payton*, 389 F.2d 224, 226 (4th Cir. 1967); *McQueen v. Swenson*, 498 F.2d 207, 216 (8th Cir. 1974).

The harmless error test is inappropriate when a defendant is denied the fundamental right to the assistance of counsel. *Glasser v. United States*, 315 U.S. 60, 76 (1942). Similarly, this test is inappropriate when a defendant is denied the effective assistance of counsel. *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974).

Whether or not this analysis should be applied to this case, the ineffective assistance of respondent's trial counsel was not harmless error. Sewell's prior convictions for assault with a knife, and carrying a knife, the latter occurring just one year prior to trial, are material to respondent's claim of self-defense. There is more than a reasonable doubt that such evidence might have influenced the verdict of the jury, *Chapman v. California*, 386 U.S. 18, 24 (1967); if not to acquit respondent, then possibly to convict her of the lesser offense of manslaughter.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

Rule 2-5 August 1, 1973

U.S. DISTRICT COURT RULES – D.C.

RULE 2-5

DISCOVERY

(a) MOTION BY THE DEFENSE.

It shall be the duty of every defense counsel, whether appointed or retained, to consult with the Assistant United States Attorney assigned to the case prior to the first status call on a criminal case. At that time counsel shall attempt to obtain from the Assistant United States Attorney informal discovery as to matters to which the defense would be entitled under the Federal Rules of Criminal Procedure and the applicable statutes and cases. No discovery motion shall be heard unless it states that defense counsel has sought the requested relief from the Assistant United States Attorney assigned to the case and that the Assistant United States Attorney has not complied with such request.

(b) ALIBI DEMAND BY THE GOVERNMENT.

(1) Upon written demand of the prosecutor stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the prosecutor a written notice of his

intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

(2) Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the prosecutor shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(3) Upon the failure of either party to comply with the respective requirements of this rule, the court shall, except for good cause shown, exclude the testimony of any witness offered by such party as to the defendant's absence from, or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify in his own behalf.

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There was nothing in this case which indicated to the prosecution that the record of the decedent was in any way favorable or usable by the defense in this case. In fact, I would say quite frankly to the Court that the Government's position prior to Burkes was that the prior record of a decedent was not admissible in evidence unless the defendant herself knew about that. And it was only after Burkes that I realized the error of my belief in that one matter. But a close reading, in fact—not a close reading—it specifically spelled out in Moore where they discuss the fact that the belief that if the Government, if the defense doesn't know of it, how can they request it. They say that the essence of Brady is the suppression by the Government of evidence favorable to the accused. And in order to have a suppression, there has to be a request for that, because there are hundreds of items in the Government's file that could be of some essence.

But even if the Government is required without a request to hand over evidence favorable to the accused, we submit that the evidence in this case—

THE COURT: Are you arguing to the Court that the status of the law is that if you have a report indicating that fingerprints were taken and that the fingerprints on the item [12] which the defendant is alleged to have assaulted somebody turn out not to be the defendant's, that absent a specific request for that information, you do not have any obligation to defense counsel?

MR. CLARKE: No, Your Honor. There is another aspect which comes to this, and that is whether or not the Government knowingly puts on perjured testimony. It has an obligation to correct that perjured testimony.

THE COURT: I am not talking about perjured testimony. You don't do anything about it. You say nothing about it. You have got the report there. You know that possibly it could be exculpatory. Defense counsel doesn't know about it. He has been misinformed about it. Suppose he doesn't know about it. And because he has made no specific request for that information, you say that the status of the law under Brady is that you have no obligation as a prosecutor to open your mouth?

MR. CLARKE: No. Your Honor, there is another obligation, but it does not come under Brady itself. It comes under more or less a higher standard. If the Court would look at Brady as a generic term of items exculpatory towards the accused, as the nature of the exculpability is great—say, for example, fingerprints on a murder weapon where there could be no other explanation but someone else did it, then, the Government in the interest, under the light of the Burkes case that the Government is after justice and not after just [13] convictions, the Government has an obligation to make that known to the defense.

But as the materiality of the items becomes less to the point where it is not material, there has to be a request, or else the Government, just like the defense, is not on notice.

In this case there were discussions on many separate occasions as to the nature of the people, and yet there was no request for anything about his background record.

Now, the Government is in the same position as the defense is in. How is the Government to know that this item is material, or, excuse me, is favorable to the defense, unless it is brought to their attention that the defense needs it. So that is why the Brady standards when dealing with items which are favorable to the defense is necessary that there be a request, and the higher standard of Burkes covers anything such as Your Honor suggested as to the fingerprints. But the Thompson case indicates that the items, the record in this case, is not material in the sense that it requires a new trial. And this standard of Thompson should be read along with the Brady standard as to the materiality requirement that the Government hand it over.

In Thompson the single issue or two issues in the case, the first one was whether or not a person could be convicted on the uncorroborated testimony of an eyewitness in a robbery case. And the Court of Appeals said that it could.

[14] The second prong of attack in Thompson was that the Government had, or the complainant in the case, the single eyewitness to the robbery, had a criminal record,

and that record could have been used for impeachment purposes, and that is newly discovered evidence which is material to the defense and should have been allowed or should have been handed over to the defense and used at trial. And the Court of Appeals indicated that it was not material, was not material to the extent that it should have been granted a new trial. It was impeachment evidence; that is basically all. This was more crucial in the Thompson case that it be allowed because in Thompson it was a single eyewitness against a man accused of committing a crime against him. And, therefore, it became the credibility of one man against another man.

But in this case the Government did not rely upon credibility. It relied on objective facts of the circumstances which showed that this defendant was of a character that was even worse than the record would have shown.

So the Thompson case, if there is any case where there should have been granted a new trial due to newly discovered evidence, that would have been the situation. And certainly not this case where the new evidence in the sense the record would not have changed the jury's determination because the crucial fact in the Linda Agurs case was that there was not a mark on the defendant. But yet the decedent had stabs on his [15] back and to his front. Regardless of what kind of a record he had, unless he was not the aggressor, he would not have been stabbed that many times.

Your Honor, in sum, the Government's position is basically this: First of all, we contend that this was not a Brady violation in light of the Moore case. But even if it is assumed that the Government should hand over without a defense request items, the third part of the Moore case applies, namely, the holding in Brady is that the prosecution suppression of evidence, and then going down, important then are, first, a suppression by the prosecution of a request by the defense, and, second, the evidence is of a favorable character for the defense, and this is the main part, and thirdly, the materiality of the evidence. And materiality of the evidence is also a criterion of Thompson.

The two together, we submit, Your Honor, indicate that in this case the record was not material, and, secondly, that its non-production is not a Brady violation.

For that reason, we ask that the defendant's motion for a new trial be denied at this time.

THE COURT: Do you wish to reply in any fashion?

MR. GASTON: Yes, Your Honor, if I may. I will try not to be too long.

First, as to the record, I am not at this point even willing to concede it was only the two convictions. The record [16] which I obtained from the U. S. Attorney's office file shows that this was an ADW offense on 9/28/63, and a final disposition, it says 180 days. The weapon was a razor.

On the same date there was an assault on a police officer, with a final disposition of 180 days.

On the same day there was a CDW, knife, final disposition, 180 days.

And then I also have a record from the Superior Court of the District of Columbia showing there to be an assault offense in 1971, and it says he was placed on one year probation, execution of sentence suspended.

This is not a matter of record, Your Honor. I wonder if I might have it admitted as an exhibit to my motion at this time and made a part of the record.

THE COURT: Yes. You don't have any objection, do you?

MR. CLARKE: Not at all, Your Honor. In fact, the Government, when it filed its opposition, also filed certified copies of convictions in the case.

THE COURT: Yes.

MR. CLARKE: I believe my secretary was to send down, I believe it is a 1963 certified conviction, once it was received. I do not know if that has been submitted to the Court.

The crucial one is the 1971 one which indicates that [17] it was a CDW conviction.

THE COURT: It will be received as part of the record in this hearing.

MR. GASTON: Thank you, Your Honor.

Mr. Clarke points out at one point that Mrs. Agurs

was totally unharmed while the decedent suffered extensive wounds, and, therefore, the evidence as to who was the aggressor was clear and, therefore, the evidence of the deceased's violent character is not of any great weight.

I would only point out in that regard, as I did at the trial, that he could have—he was drunk at the time, as Your Honor may recall, or had sufficient alcohol in his system to be drunk, and he could very well have overcome her just with his own body, and in order to protect herself, she—

THE COURT: Cut him everywhere but on the bottom of his feet.

MR. GASTON: Well, there were stabs to his front.

THE COURT: That's right.

MR. GASTON: And cuts in back.

THE COURT: That's right. She sliced him up, and knew that he was drunk. She knew his condition.

MR. GASTON: Well, if he was coming after her—

THE COURT: It wouldn't make any difference. That doesn't give her a right necessarily to kill him. He wasn't coming after her with his knife.

[18] MR. GASTON: No, he wasn't.

THE COURT: Because he was out of the room and that is what started all of this business. He was out of the room and she was clipping him for the money he put over, that he hid, because he knew under the circumstances he could be rolled.

So in addition to whatever fee he had worked out with her, he could be clipped for all of the money he had, the money he was going to take his wife to New York with, until she decided she didn't want to go with him, and then he went on the drinking toot.

Then the defendant picked him up at some bar and took him around to the tourist home. She wasn't satisfied with the amount of money that she was going to get. She wanted that plus what he had over on the windowsill. And he came back from the restroom when she was in the act of getting the money. And he had disrobed because he was found nude. She was in the room and had access to the weapon. She knew people she would pick up on 7th Street in a bar would be armed with something. It is a wonder she didn't get a gun instead of a knife. All she found was a great big sheath knife. When he came back and started raising cane about his money, that is when she let go. Certainly, he went after her for the money.

MR. GASTON: I do recall—

THE COURT: There was no attempt in this case by the Government at any time to present the decedent in any fashion [19] other than the light in which he was presented. The decedent's wife took the stand. There was ample opportunity—and she certainly demonstrated hostility. She said she wasn't even willing to go to New York with him and reconcile with him because they had all kinds of differences.

So it isn't like the decedent was pictured to this jury as some—well, I can't say white knight in shining armour—black knight in shining armour.

He was made out to be exactly what he was.

MR. GASTON: Well, I do recall the wife testifying she was unable to go to New York with him. But I personally don't recall it was because of his violent character.

THE COURT: I didn't say that she said it was because of his violent character. It was indicative of the fact that she wasn't willing to reconcile with him. She didn't want to have anything to do with him, even though he had some money in his pocket.

All I am suggesting is that there was ample opportunity to explore any of this business and put it in any light that you wanted to put it. There was no attempt by the Government to paint it in any other fashion. There was nothing excluded by way of proper evidence by the Court.

MR. GASTON: I will agree with all of that.

THE COURT: You will have to agree with it because that is the fact.

[20] MR. GASTON: Well, I think that could rightly be drawn from certain facts.

THE COURT: The jury drew them, and the jury drew them in proper context. And where the Court of Appeals in its order remanding this case got any indi-

cation from anything that I have said or done in this case that I was about to grant a new trial, I do not understand, because my order denying your motions was under the then applicable law, namely, when the case was under appeal, I had no jurisdiction to consider a new trial. They remanded it for my consideration.

But I don't think there is any justification for the inference in this order that I was prepared to grant your motion for a new trial. And I am not granting a motion for a new trial in this case.

MR. GASTON: Could I make one other point for the record, Your Honor, and then I will close.

As to the discussions which Mr. Clarke refers to we had wherein it was pointed out that neither the decedent nor the defendant were pillars of the community, and the statement that I could have subpoenaed the police records, it is true that Mr. Clarke did indicate to me that they were not pillars of the community. But I fully expected that any information that I was entitled to that Mr. Clarke would turn over to me. For all I know, any information he may have had may have had to do with gambling, prostitution or any number of other things.

[21] I would also like to, on one occasion in another case, I remember approaching then Assistant United States Attorney John Gill requesting a stipulation from him that he would turn over to me any exculpatory evidence. And he denied that request flatly, saying that it was an insult to his integrity, because he was obligated under the law to turn over anything to me that was favorable to the accused, and by my making the request, I was insinuating that he was unwilling to do that.

So when I was engaged in these conferences with Mr. Clarke, I fully expected under that attitude that I would be given any information that would be favorable to the accused. And I think that in this case the issue of the decedent's prior background showing that he had a tendency toward violence and assaults went right to the very heart of this case as to who was the aggressor in that room.

THE COURT: But, you see as to who was the aggressor, let's assume that he was the aggressor. Let's assume that he was the aggressor. As Mr. Clarke points out, there was no indication that as a result of the decedent's aggression, she suffered a bruise or anything else, none whatsoever.

MR. GASTON: She had the knife.

THE COURT: You said that the decedent was the aggressor?

MR. GASTON: That's right.

[22] THE COURT: Yes. Aggressor in what?

MR. GASTON: Coming after her and she was defending herself with the knife and stabbing him in the process.

THE COURT: Yes.

MR. GASTON: And his concern was for the knife and going after her and trying to avoid the knife, but still continuing to go after her. That is my argument.

THE COURT: So even assuming that he was the aggressor, that doesn't give her the right because of that aggression to go any further in repelling his aggression than was necessary, does it?

MR. GASTON: Well, Your Honor, I think that the jury, if given the additional information, might very well—

THE COURT: Have thought that he was a thug who carried a knife and was used to a fight. She knew when she picked him up, she knew what he was. And you say it would have made all the difference in the world if they had known before he had been convicted of X, Y and Z, or two assaults, or whatever it was, carrying a deadly weapon. They knew he carried it, knew he brought it in. There was no contention she brought the knife in.

MR. GASTON: That's right.

THE COURT: None whatsoever. You say that a CDW conviction and an '63 ADW conviction would have made all of the difference in the world?

[23] MR. GASTON: I am saying that it was enough evidence that the jury would have found it of significance in making their determination.

THE COURT: All right. I don't think there is any justification under the law as I understand the facts of this case for a new trial.

MR. CLARK: Your Honor, the Government has taken the liberty of preparing an order in this case. We will submit it to the Court for its perusal.

(Hearing concluded.)

REPORTER'S CERTIFICATE

This record is certified by the undersigned Official Reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.

DOYNE W. SPENCER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 2081-71

UNITED STATES OF AMERICA

v.

LINDA AGURS

ORDER

Upon consideration of defendant Linda Agurs' motion for a new trial and the opposition thereto filed by the Government, this case having been remanded to this Court by order of the Court of Appeals on July 16, 1973, and it appearing to the Court that defendant has failed to state a claim upon which a new trial should be granted, *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951); *Moore* v. *Illinois*, 408 U.S. 786 (1972), it is hereby

ORDERED, that defendant's motion for a new trial be and hereby is denied.

/s/ Aubrey E. Robinson
AUBREY E. ROBINSON
United States District Court
Judge

Date: July 24, 1973

[Filed Dec. 3, 1973, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeals No. 72-2072
73-1956

UNITED STATES OF AMERICA

v.

LINDA V. AGURS, APPELLANT

COUNSEL'S MOTION FOR CONSIDERATION OF APPOINTMENT OF SUBSTITUTE COUNSEL FOR APPELLANT

Robert T. Gaston, court appointed attorney for the appellant, Linda V. Agurs, moves this Court to consider appointing a substitute counsel to represent her, and states as his grounds therefor:

1. On December 16, 1971, the United States District Court for the District of Columbia appointed Robert T. Gaston, the undersigned counsel to represent Linda Agurs *nunc pro tunc* as of September 27, 1971.

2. Mrs. Agurs was accused of committing second degree murder upon James Sewell. The direct evidence elicited much later during the trial (July 5-7, 1972) was to the effect that James Sewell and Mrs. Agurs entered a room in a tourist home; shortly thereafter the desk clerk heard screams from Mrs. Agurs requesting help; the desk clerk and some other workers in the tourist home broke down the locked door to the room and found Mrs. Agurs and Mr. Sewell on the bed, Mr. Sewell on top of Mrs. Agurs struggling with Mrs. Agurs over a knife which was pointed downward toward Mrs. Agurs; the individuals entering the room pulled Mr. Sewell off Mrs. Agurs and struggled with him for approximately 20 seconds before extracting the knife from his grasp; while

Mrs. Agurs was virtually unwounded, Mr. Sewell sustained several wounds which eventually caused his death on the evening of the occurrence. This brief outline of the evidence at trial is provided at the outset of this motion to highlight the importance of the issue of who was the aggressor in the struggle between Mrs. Agurs and Mr. Sewell. From the beginning, self-defense was the primary defense available to Mrs. Agurs.

3. On January 11, 1972, the undersigned counsel, Linda Agurs, and Assistant United States Attorney John Clarke, Jr., appeared before Judge Aubrey Robinson of the United States District Court for the District of Columbia for the purpose of reviewing Mrs. Agurs' bond and also to report on the status of the case including discovery. At that court appearance, said counsel stated that he would like to have a stipulation as to discovery placed on the record. Judge Robinson asked if it was really necessary, indicating that he had never had any problem in regard to Mr. Clarke turning over information to defense counsel. Counsel stated that there had been no problem up to that point but that he wanted to cover matters which might arise in the future. Judge Robinson indicated that if there should be any trouble in obtaining information during the proceedings that counsel should notify him. As a consequence, no stipulation was made on the record. (This information is presently obtained from a memorandum of that proceeding made by counsel and just recently found by him. A transcript of that hearing is being requested.)

4. While counsel's file makes no mention of it, counsel does recall that either on January 7 or February 2, 1972, Mr. Clarke did state as an aside to counsel that neither Mrs. Agurs nor the decedent were pillars of the community.

5. On April 24, 1972, while counsel was interviewing a witness, the witness indicated that he had heard that the decedent might have been arrested a number of times and possibly convicted for assaulting various people including a police officer with a knife. Counsel made a note of this conversation thinking that if the decedent did in fact have such a record and Mrs. Agurs knew of it at the

time of the incident that evidence of the decedent's prior record would be helpful and admissible for the purpose of showing the reasonableness of her conduct in defense of herself.

6. During either the first or second week in May, 1972, counsel conferred with an older, semi-retired member of the District of Columbia Bar who had had a large amount of experience in practicing criminal law and who also was a professor of criminal law during a portion of his career. Counsel asked this individual if he knew of any way that the possible past record of the decedent could be admitted into evidence if Mrs. Agurs did not know of that record at the time the incident occurred. He first agreed with counsel that there would be no problem getting such a record into evidence if Mrs. Agurs knew of its existence at the time of the incident. He went on to say that he knew of no way that counsel could get the record into evidence if Mrs. Agurs did not know of its existence at that time. However, he suggested that counsel review the case of *Griffin* v. *United States* (D.C. Cir.—1950) 183 Fed. 2d 990, and stated that he would think the matter over and if he came up with anything, he would let counsel know. Counsel did not hear from him again on this matter.

7. On June 2, 1972, one month from the trial date of July 5, 1972, counsel conferred with Mrs. Agurs who indicated that she did not know of any criminal record that the decedent might have had.

8. In light of Mrs. Agurs' statement and the conference with the above described member of the Bar, counsel felt quite sure that any evidence of the decedent having a past criminal record would not be admissible. This, coupled with the pressing need to prepare for trial on what seemed much more promising grounds, led counsel to all but forget about any past record of the decedent that might have existed.

9. Counsel believes that it can be said with some objectivity that had the government informed him of the actual existence of the decedent's past record during discovery proceedings, he would most likely have continued to pursue the matter to the extent of at least researching the admissibility of such evidence notwithstanding Mrs. Agurs

lack of knowledge of it at the time of the inciednt.

10. On July 5, 1972, trial began. The defense raised was that of self-defense, and one of the primary issues, if not the ultimate issue, was whether Mrs. Agurs or the decedent was the aggressor in the struggle which led to the latter's death.

11. On July 7, 1972, Mrs. Agurs was found guilty by the jury of second degree murder.

12. On October 20, 1972, Mrs. Agurs was sentenced by Judge Robinson to five to twenty years imprisonment.

13. On November 13, 1972, this Court appointed counsel to represent Mrs. Agurs on appeal.

14. On Saturday, November 18, 1972, the undersigned received at his office the Monday, November 20, 1972, issue of the Washington Law Reporter, Volume 100, Number 225. On the front page of that issue, appeared the case of *United States* v. *Burks*, U.S. App. D.C. No. 71-1821, October 19, 1972, —— U.S. App. D.C. No. ———, 470 Fed. 2d 432. The opinion stated in part, on the front page of that issue:

> As this Court has long recognized, evidence of the deceased's violent character, including evidence of specific violent acts, is admissible where a claim of self-defense is raised. Such evidence is relevant on the issue of who was the aggressor and, where there is evidence that the defendant knew of the deceased's character, on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily injury.

Then later on Page 2284 of the same issue, the opinion further stated:

> As noted earlier, however, where self-defense is raised and there is an issue as to who was the aggressor, evidence of the deceased's violent character is relevant and admissible even though unknown to the defendant. Thus the defense in this case had a right to prove any violent acts of the decedent, regardless of whether appellant testified that he knew about those acts.

15. On November 20, 1972, counsel attempted to reach

Assistant United States Attorney John Clarke and tried again on November 21 on two occasions. On November 22, counsel went personally to the United States Attorney's Office and finding Mr. Clarke absent spoke with Assistant United States Attorney John Mulrooney. Counsel requested that he review the United States Attorney's file on this case to discover whether or not the decedent had a criminal record of assault. Counsel went with Mr. Mulrooney to what was apparently a "closed files" room where Mr. Mulrooney located the file and after searching it for approximately four or five minutes found the decedent's police record near the beginning of the file. The record disclosed that he had in fact been convicted of at least one charge of assault and another charge of carrying a dangerous weapon. Counsel contends that the record also reflected convictions for assault with a dangerous weapon and assault on a police officer, but the government disputes this contention.

16. Upon discovery of the record, counsel believed that among the possible arguments for appeal were the government's failure to inform defense counsel of evidence favorable to the accused (the decedent's past record) and the ineffective assistance of counsel. Counsel believed then, as he does now, that the decedent's prior record should have been brought to the attention of the jury and that the jury would have found the evidence of significance in making its determination. Obviously, the failure to get the evidence to the jury was due either to the government's failure to disclose the decedent's criminal record to counsel, or counsel's failure to pursue a lead indicating that the decedent might have had a criminal record.

17. Rule 33 of the Federal Rules of Criminal Procedure state in substance that a motion for a new trial based on the ground of newly discovered evidence may be brought within two years after final judgment, but that a motion for new trial based on any other grounds must be made within seven days after the verdict or finding of guilty. As set forth earlier, counsel did not realize the existence of the above described issues until he read the *Burks* case one month after Mrs. Agurs was sentenced. Therefore, counsel believed that the issue of ineffective assistance of counse could be raised upon appeal only. He believed further that the issue of the discovery of new evidence (the decedent's past record) and the government's failure to produce it could be raised at the District Court level via a motion for new trial. It appeared to counsel that Mrs. Agurs interests would best be served by proceeding in such a fashion. (In light of this Court's recent decision in *United States* v. *De Coster* U.S. App. D.C. No. 72-1283, October 4, 1973, the Washington Law Reporter, October 31, 1973, counsel now believes that perhaps his ineffectiveness at trial could have been raised simultaneously in the motion for a new trial.)

18. Therefore, on February 2, 1973, counsel filed in the United States District Court for the District of Columbia a motion for a new trial on the ground of newly discovered evidence and the government's failure to produce it. On July 16, 1973, this Court ordered the appeal remanded to the District Court for a decision on the motion for a new trial. Upon remand, the motion was denied and a new appeal was taken from that denial. On November 5, 1973, the two appeals were consolidated.

19. At this point, counsel feels that the issue of ineffective assistance of counsel must be raised, and the question arises as to whether someone other than himself should argue the point. Counsel has conversed by telephone with his client concerning the matter, and she has indicated that she would like counsel to remain in the case. However, since counsel was appointed to represent Mrs. Agurs by this Court, he believes that the ultimate decision should be made by the Court which may believe that regardless of counsel's desire to be objective, another attorney might well pursue the issue of counsel's ineffectiveness with greater vigor. Should the Court see fit to appoint another attorney, counsel will, of course, make himself available for consultation with that attorney.

/s/ Robert T. Gaston
ROBERT T. GASTON
Court Appointed Attorney for Appellant
4702 Chevy Chase Drive
Chevy Chase, Maryland 20015
652-4822

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was hand-delivered to the United States Attorney s Office. United States Courthouse, Washington, D.C. 20001 and mailed, postage pre-paid this 3 day of December, 1973, to the Appellant, Linda V. Agurs, Box A, Alderson, West Virginia 24910.

/s/ Robert T. Gaston
ROBERT T. GASTON

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 2081-71

UNITED STATES OF AMERICA

v.

LINDA V. AGURS, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

Courtroom No. 4
U. S. Courthouse
Washington, D. C.
Wednesday, April 17, 1974

The above-entitled matter came on for hearing on Motion for New Trial in open court at 9:55 o'clock a.m., before THE HONORABLE AUBREY E. ROBINSON, JR., United States District Judge.

APPEARANCES:

JOHN O. B. CLARKE, ESQ.,
Assistant United States Attorney, appearing on behalf of the United States of America.

EDWIN J. BRADLEY, ESQ., and
ALLAN RUBENSTEIN,
appearing on behalf of defendant.

—oOo—

EUGENE T. FEDORATION
Official Court Reporter
6804 U. S. Court House
Washington, D. C. 20001

[2] PROCEEDINGS

THE DEPUTY CLERK: Linda V. Agurs, Criminal Action 2081-71.

MR. BRADLEY: Your Honor, my name is Edwin Bradley, representing Mrs. Agurs in the Court of Appeals in connection with her appeal there. This is Allan Rubenstein, a third year student at Georgetown Law Center, authorized by Rule 20 of this court to participate in the appeal. Do we have Your Honor's gracious consent to allow Mr. Rubenstein—

THE COURT: I think he has been so advised, counselor.

MR. BRADLEY: Thank you.

MR. RUBENSTEIN: May it please the Court—

THE COURT: I wonder, before we start this, I have a short matter, merely to set a trial date in the case. I wonder if I could take care of that. Then I will hear you.

(Whereupon, the Court proceeded with other matters on its calendar, at the conclusion of which the following proceedings were had:)

THE COURT: Now, Mr. Rubenstein, we are ready to hear you.

MR. RUBENSTEIN: The defendant asks this Court for a new trial as required in United States v. DiCosta because she asserts that in the preparation and at her trial for second degree murder, the trial counsel provided her with ineffective assistance by being substantially in violation of the requirement [3] in DiCosta, therefore denying the defendant her Sixth Amendment right to counsel.

It is defendant's position that trial counsel, in cooperation with the defense, has fully stated the facts leading to the conclusion of ineffectiveness. Those facts are stated in its motion that was filed with the Court of Appeals and in the affidavit that was attached to the motion in this case in this hearing.

It is defendant's position that there is no issue of fact as to what trial counsel did or did not do, and that the

government cannot fairly dispute what trial counsel did or did not do. There is no other conclusion from trial counsel's written assertions but that he was ineffective under the DiCosta standard.

That being the case, the defendant contends that the burden of going forward shifts to the government who must show that trial counsel's substantial violation of the DiCosta standard of effective assistance of counsel is harmless error beyond a reasonable doubt. This procedure is in accordance with the case of Chapman v. California where the Supreme Court said that the beneficiary of a constitutional error—the government in this case—must prove that there is harmless error beyond a reasonable doubt and that the error complained of—here trial counsel's ineffectiveness—did not contribute to the verdict obtained. DiCosta reiterates this procedure.

[4] Defendant contends that trial counsel violated the requirement of DiCosta, that is, that requires that defense counsel make adequate legal and factual investigations prior to the trial. In his motion with the Court of Appeals, trial counsel stated that he was told by a witness that the decedent had possible arrests and convictions of violence. In his affidavit he stated that neither at that time nor later did he make a factual investigation to follow up that indication of the decedent's reputation for violence. However, a few months before he had met with the witness, he did make a general request of the government, a general discovery request of the government.

In his motion he states that based on a conversation with another attorney, he erroneously concluded that decedent's record, if indeed it did exist, would not be admissible in due evidence. Trial counsel did no personal legal research on this crucial point of law. As a result of no other factual or legal research on this point, trial counsel never discovered the evidence of decedent's reputation for violence, nor its admissibility into evidence.

The standard for ineffective assistance of counsel is stated in DiCosta. Counsel must conduct appropriate investigations, both factual and legal, to determine what

matters of defense can be developed. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities, and, of course, [5] the duty to investigate also requires adequate legal research.

The undisputed facts show that trial counsel has substantially violated the standard which has affected and caused the defendant to be deprived of her Sixth Amendment right to counsel. It is now the government's burden to show beyond a reasonable doubt that trial counsel's error was harmless to the defendant. Specifically, in this case, the government must prove beyond a reasonable doubt that upon retrial, new trial counsel, knowing of the evidence of decedent's violent character and knowing of its admissibility, could gain for the defendant either an acquittal or even a conviction of the lesser included offense of manslaughter.

At this point the defendant contends that she has shown that trial counsel was ineffective and that the government must show beyond a reasonable doubt that the error was harmless to her.

THE COURT: All right.

MR. CLARKE: May it please the Court, Your Honor, as the government has indicated in its opposition to the defendant's motion for a new trial, the government submits that the defense position is based on an erroneous interpretation of DiCosta.

The first point to be considered here, we would submit, is whether DiCosta is retroactive as far as the lifting of the burden as counsel for the defense now claims it is. This trial occurred in June of 1972. DiCosta was decided on October [6] 4, 1973, well over a year after counsel performed in this case and, as the government would submit, performed diligently and conscientiously.

But besides that, the government does not rest its case, Your Honor, on that legal assertion that DiCosta is not retroactive as far as burden. We would submit that even if this Court applies DiCosta retroactively, DiCosta, on its very face, does not show that counsel in this case was ineffective in any way.

Under DiCosta, the Court stated on page 10 of the slip opinion:

"Accordingly, we adopt the following standard."

This is for an interpretation of what effective counsel is considered.

"Accordingly, we adopt the following standard."

"A defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent, conscientious advocate."

That, Your Honor, we submit, is a further expansion or an interpretation of the first part of the Bruce test of ineffective assistance of counsel on collateral attack. The Bruce test indicated that there were two prongs to it that the Court must find before it could find ineffective assistance of counsel. The first part is that there had been or has been, as the Court stated, gross incompetence of counsel, and the [7] second part, "And that this has in effect blotted out the essence of a substantial defense either in the District Court or on appeal."

DiCosta merely goes to that first part, to define what is meant by gross incompetence of counsel. As DiCosta indicates, it has to be reasonably effective assistance of counsel.

Now, the government indicated in its response—apparently this remark has hit the quick of appellant counsel at this time—that a trial is not a classroom exercise; it is not something that counsel is graded upon, and if he fails, gets, say, eighty percent or under, then his defendant is entitled to a new trial. There is always error, whether it be factual error or legal error, at a trial. The mere fact of error itself does not indicate that the accused in the case, the defendant on trial, was deprived of effective assistance of counsel. The Constitution does not require perfect representation. It requires, as DiCosta indicated, reasonably effective representation.

Granted, counsel made a mistake in this case on a legal point. However, he recognized that legal point. He did do research, albeit to another counsel rather than

going to the books to find out what was meant by the interpretation. He received an impression from one counsel, and that impression, we might add, Your Honor, up until the Burks case was decided, [8] appeared to be the controlling procedure in this Court as might be evidenced by the fact that the court in the Burks case was Judge Jones.

Now, this does not mean that Judge Jones does not make any legal mistakes. There have been several cases in which he has been reversed. But Judge Jones is a very cautious, conscientious judge, and his impression and the impression of the prosecutor at the time of the Burks case, and the impression of defense counsel, was that before a person's prior record could be introduced into evidence to show disposition to commit violent acts, the accused, the defendant on trial, must have know about those particular acts. That is the same impression of the law that the defense counsel had in this case.

Now, taking that one step further, going into whether or not that erroneous impression of the law indicates or evidences ineffective assistance of counsel, the government would rely upon those cases cited by the defense to show that an erroneous impression of the law can in fact be ineffective assistance of counsel. We do not submit, Your Honor, that it can be. But, assuming for purposes of argument, that it can be, going to the California case of People v. Ibarra, in that case counsel's misimpression of the law was that an accused must have had a property taken from him and not just in his presence before he would have a standing to object to it.

In Ibarra, the defendant's at-trial defense was that [9] he did not have possession of the property that was seized from his person, and, based upon that defense, when the court inquired of him whether or not he wished to raise the motion to suppress, said no, that his defense was inconsistent with the statement of the defendant, the statement of the police officers, and for that reason he did not have standing to challenge the legality of the seizure.

As the Court of Appeals indicated in the Ibarra case, the facts as shown at trial clearly evidence an illegal seizure, and even after the trial court asked and reasked of defense counsel whether or not he wanted to raise the motion to suppress, defense counsel still refused to do so, and as the Ibarra court indicated, counsel's erroneous impression of the law—something that was a cardinal principle in the California courts and in fact in all federal courts too—counsel's erroneous impression of that was something that blotted out the very essence of the defense to the accused, the motion to suppress, which was completely destroyed by counsel's erroneous impression of the law.

In this case it is just the contrary. The defense of the accused in this case all along was that of self-defense. The evidence that is now asserted as being so crucial that it could have resulted in an acquittal is such that it is merely, as we indicated in our response, at best only corroborative of the defense of the accused. It does not raise a separate [10] defense. The defense of self-defense was in the case from the very beginning, in the government's case in chief. The defense had not elected to put on any evidence. The only thing that this would go to was who was the aggressor, the same thing that the government's evidence raised and the defense seized upon to indicate that the defendant should be acquitted.

The evidence now asserted as being so crucial, we would submit, Your Honor, in light of all the evidence in this case is not of such a magnitude—in fact, it is far less than that. Possibly it goes to show a violent character of the deceased. But the very facts in this case showed that also. Here was a man who in the middle of the day picks up a woman in a prostitute situation, a man who is carrying a five-inch sheath knife on his person as well as a smaller knife on his person. A man who enters a motel room in that type of situation and then winds up dead.

But the important and crucial fact, no matter what type of reputation the man had—and this is a 1963 conviction that they are talking about and a 1971 charge

of carrying a dangerous weapon—regardless of that type of evidence, that does not in any way affect the crucial fact that the deceased had five stab wounds, deep stab wounds, besides numerous amounts of lacerations, while the defendant did not have a single mark upon her person.

The evidence of the defense that they now seek to [11] introduce by way of prior criminal record, if anything, would strengthen the government's case, because here is a man who supposedly is so violent and so good with a knife that he always carries one, would it not be reasonable to assume that he wouldn't have received the injuries in that case, that he would have in fact inflicted them upon the defendant if he was in fact the aggressor?

The issue was clearly presented to the jury. It was not blotted out by any erroneous impression of counsel of the law. The jury had the full consideration in this case, and the time of their verdict, twenty-five minutes after they went out, clearly goes to show that the crucial fact in this case was that the defendant did not have a mark on her while the decedent had five marks. The scream of the defendant did not affect the verdict, did not go into the facts in this case except to show one thing: After she had savagely stabbed this man five times, he still came after her. And as the government argued to the jury, the fact of the scream is something that anyone would anticipate after a person who tried to kill someone, the person didn't die but kept on after him.

We submit, Your Honor, that the evidence in this case is not such that it in any way goes to show ineffective assistance of counsel. In fact, the very fact that the defense counsel would claim that he himself was ineffective goes to show more than anything else that Miss Agurs did have the [12] representation of a diligent and conscientious attorney who put his own personal esteem well below that of his client as DiCosta requires. This is a clear example of someone who received the best assistance of counsel that could be afforded.

We would submit, Your Honor, that the defense motion should be denied in this case.

There are no further questions that the government would submit.

MR. RUBENSTEIN: Your Honor, I would like to respond to the points that the government did make. On the first point the government made on retroactivity, it is my understanding of the law that just because the case, the DiCosta case, came down after the trial does not mean if would not apply to the case. Mrs. Agurs was deprived of a constitutional right, and it is not a question of whether the trial took place before. She always had that constitutional right, and unless it is for some administrative reason, the courts have always said that in a case of losing a constitutional right, that the defendant should have it.

THE COURT: What constitutional right was she deprived of?

MR. RUBENSTEIN: Her Sixth Amendment right to counsel.

THE COURT: She had counsel.

MR. RUBENSTEIN: Well, effective assistance of counsel as shown in DiCosta.

[13] On the next point, the government says that DiCosta is only an interpretation of Bruce. DiCosta itself says, on page 8 of the slip opinion, that in Bruce the claim of ineffective assistance arose on collateral attack, and in this case it is not on collateral attack. The court in DiCosta goes out of its way in saying it is setting a standard different than Bruce, and the Bruce standard is ambiguous and it was going to clarify it.

THE COURT: Which is all the more reason to suggest that in the context of this particular case, any suggestion of retroactivity is of less weight. Is that not correct?

MR. RUBENSTEIN: I would agree, yes, Your Honor.

On the next point, speaking of legal research, the government spoke to the fact that counsel did make some research; that is, he spoke with another attorney. The defense would contend that that is not adequate

at all. One has to do his own personal legal research and not rely on another attorney. That is what the defense contends is adequate legal research. And to clarify, the point that the government made was that the Burks case occurred after or came down after this trial. The defense wouldn't argue with that. But Burks relied heavily, if not exactly, on Evans v. United States which came down in 1960, and Evans is the leading case on this very point, that trial counsel did not find out. In fact, Evans is the leading case in ALR just on this exact point. So, it is not as if it is an [14] obscure point as the government tried to compare in People v. Ibarra. This is an important point.

The next point that the government raises is that this evidence was merely corroborative. It is the defense's position that there was no such evidence of the violent reputation of the decedent at trial at all. The defense counsel or trial counsel presented no evidence himself, and the government says that whatever violence—or that there was some evidence of violence in the case, that is, he carried a knife. But the place where decedent and the defendant met was a place that it would be common knowledge that somebody would be carrying a knife or some kind of weapon to protect themselves. So, just the very fact that he had a knife would not say that he had a reputation for violence or was a violent man. Where he was, you would need a knife or any kind of a weapon; it was understood that you need a weapon to protect yourself.

Now, on the next point, of the wounds, the jury in the other trial or in the trial that did occur did not hear any of this evidence that he had a record of violence in 1963 of pleading guilty to an assault on a police officer and several arrests of that nature at the same time, and also in 1971 of pleading guilty to carrying a deadly weapon and other arrests around that time of a violent character. The jury heard none of that. And while hearing none of that, it did hear about the stab wounds on the decedent and of the defendant having no marks.

[15] But a jury in the second trial or in a new trial will have heard that and then could make a reasonable inference that those stab wounds could have occurred in close quarters. Nobody was there. It is totally circumstantial exactly what happened. The defendant did have the knife when the people broke in. But we don't know at all what happened, and the decedent's reputation for violence, which was not shown in the first trial, now will be shown in the second trial and the jury could make a reasonable inference or certainly the government can't explain it beyond a reasonable doubt, that an inference, a reasonable inference couldn't be drawn in the second trial that he was the aggressor, that a scuffle ensued and as a result the decedent died.

So, I would like to go back to the point that or the defense—

THE COURT: Is my recollection of the evidence correct, that there was testimony about the money behind the blind?

MR. CLARKE: Excuse me, Your Honor.

THE COURT: Wasn't there some indication about that? Wasn't money found in this room?

MR. CLARKE: Your Honor, this is the case where the decedent had three hundred and some odd dollars on his person when he went into the room or when he left his wife earlier that day, and at the time of his death he didn't have any money on him, including the change from the payment of the room. I do [16] not remember any money being found on the premises or on the body of the deceased. The government attempted to argue that this was a case of a rolling where the deceased found the defendant going through his pockets after going to the bathroom, and at that time the incident occurred, the killing occurred.

MR. RUBENSTEIN: There was also testimony that the last time anyone had seen the decedent was when his wife had seen him get on a bus, and it was several hours between that time and—

THE COURT: I know the last time he was seen by anybody was the clerk, the clerk of the tourist home, and he told her about the $14, I believe. Wasn't it $14?

MR. CLARKE: I believe it was $10.

THE COURT: Ten dollars for the room, and there was no bathroom. But the last time the decedent was seen was by the tourist home clerk.

MR. RUBENSTEIN: But the clerk didn't know he had the money. But even so, if we even take the most negative inference that she was rolling him, that does not say she was intending to kill him at all. It is very possible that maybe he—

THE COURT: Oh no, she was not indicted for first degree murder.

MR. RUBENSTEIN: All right. Even so, it is not unreasonable that she acted in self-defense. She took the money and then he came after her, then to protect herself she acted [17] in this way. That caused him, the decedent, to die. It is not as if—

THE COURT: Well, I think it was argued—I think all of the inference was that from the situation as it was developed by the evidence, he had gone out of that room to go to the bathroom.

MR. RUBENSTEIN: Right.

THE COURT: And something happened when he walked in the door.

MR. RUBENSTEIN: But the jury does not know of this reputation for violence, only the fact of his carrying the knife, and the defense would contend that that's not enough to say or to infer that he has a reputation for violence, that he carried a knife, that he came from that area where he would very likely carry a knife for his own protection, and the jury was not told at all of the conviction of the years past, of the violence convictions, assaults, assaults on police officers.

THE COURT: And if they had known that, you argued that they would have acquitted him?

MR. RUBENSTEIN: Well, we are not saying that. We are saying that the government has to show beyond a reasonable doubt that there is no chance that she would have been acquitted and there is no chance that the jury would have come back with a conviction of manslaughter. That is for the government to say. We are not saying it is definitely, but it is beyond a [18]

reasonable doubt under the Chapman standard. And it is reasonable for the jury in the second trial, after hearing the new evidence given to them of his reputation—

THE COURT: I thought I charged manslaughter just about as clear as it could be charged.

MR. RUBENSTEIN: That was charged.

THE COURT: —in this case. I thought I charged self-defense as clearly as it could be charged and fully so that every facet of—

MR. RUBENSTEIN: The defendant does not claim that there was any problem with that. The problem is that the jury never found out, because trial counsel had not found, the facts of his record, nor did he believe that such record could have been—

THE COURT: No, no. I am not clear, but the trial counsel didn't know anything about his prior convictions.

MR. RUBENSTEIN: Well—

THE COURT: He never explored them.

MR. RUBENSTEIN: Well, he had an indication and then he decided that—he was just relying on that other attorney's opinion. He understood that even if he did find them, he couldn't have used them. But that was totally erroneous. And as a result, they weren't presented and the jury didn't hear that. Although everything else was proper, the jury never heard it and it wasn't able to draw this other possible reason- [19] able inference, that the government has to show beyond a reasonable doubt that the jury couldn't draw such a reasonable inference.

THE COURT: The high standard to which the government is held.

MR. RUBENSTEIN: Pardon me?

THE COURT: It is a high standard to which the government is held under the rationale of DiCosta.

Excuse me one moment.

(The Court confers with counsel in another case.)

THE COURT: I'm sorry.

MR. RUBENSTEIN: I would like to emphasize that the defense does not contend that there was any error in the trial, at least at this point, any error in the trial itself. As DiCosta says, the court, the trial court will never know, cannot know in any way mistakes or any errors or any other problems occurring outside of the court.

THE COURT: We can know but we are constrained to stay out of it. We are constrained to let counsel make a judgment. For example, this woman did not take the stand. She was the only other person in that room. But her reputation was already perfectly apparent from the testimony as to what happened in the tourist home. But counsel, having conferred with her—

MR. RUBENSTEIN: Well—

THE COURT: Don't interrupt. I will give you an [20] opportunity to speak—made a decision not to put her on the stand. She was the only other person who could have explained that he came busting through that door breathing fire, and before she could move, he jumped on her and started to choke her or do something to her, and she reached over and knew that he had a knife or found a knife that he had on him and protected herself as best she could. She was perfectly free to get on that stand and tell that, if that's what happened.

But she made an informed judgment. It would have been very helpful to the jury, I think, to have known. There were only two people in the room, the decedent and her. You say you didn't kill him or I killed him in self-defense. Why don't you get on that stand and tell us that. We know you are a prostitute. We know you are nothing. We know all about that. We know he is nothing because his poor wife had to come down here and bare her soul.

And that's an informed judgment that counsel was putting to her to make, that he could not demand, nor could the prosecutor, nor could the jury demand that she take the stand.

MR. RUBENSTEIN: Well, the defense is not saying that—we can't say what went into his decision, first of all, of her taking the stand, and also that no inference

should be drawn from the fact that she didn't take it. Her Fifth Amendment right is to remain silent.

THE COURT: You can tell that to juries from now [21] until. It is fine in the Court of Appeals. The Supreme Court has said that with great clarity. But those twelve jurors are not lawyers. They are not lawyers and they are going to want to know why. And self-defense has to be inferred, by the way. Self-defense has to be inferred. Out of an abundance of caution, you give self-defense in a situation like this. So that what you say is technically correct.

MR. RUBENSTEIN: But in addition to that, in the second trial, with the new trial, counsel knowing of the fact of the decedent's reputation for violence and that it is admissible, with those facts in his mind, his tactical judgment might very well be to put the defendant on the stand and testify.

THE COURT: But she didn't know anything about it. So, all you are going to get from her is that now she is going to tell at the new trial what she had an opportunity to tell at the first trial. And she didn't know anything about this man. She never laid eyes on him before. She picked him up in a bar, made a bargain and was prepared to keep her end of the bargain, so she said, or so it was up at least to the time he paid the $10 to the tourist clerk and went in the room with him.

MR. RUBENSTEIN: Well, whether she was a prostitute also does not go to her violent character. It is a question of his violent character. And this would add to that in the new trial, and the first jury did not—

THE COURT: Hindsight is 20/20, counselor. No [22] question about that.

MR. RUBENSTEIN: We are not saying though that the new jury would definitely do this. We are just saying that the new jury—this would be a reasonable inference to draw upon hearing this evidence which wasn't in the first trial, and it is for the government to show that there would be no reasonable inference beyond a reasonable doubt that there could be an acquittal—there wouldn't be an acquittal in the second trial. But even

the distance between another conviction of second degree murder and an acquittal is one thing but it is less between second degree murder and manslaughter.

THE COURT: Oh, I understand your argument.

MR. RUBENSTEIN: Right.

THE COURT: And it is a proposition that figured rather clearly in the DiCosta case.

Do you wish to respond or do you have anything to say?

MR. CLARKE: Just briefly, Your Honor.

Your Honor, the only thing the government would respond to is again the standards that are to be applied and the correct interpretation of DiCosta.

Counsel indicates that once there is a showing of ineffective assistance of counsel, the burden is then on the government to show beyond a reasonable doubt that that ineffective assistance of counsel did not in any way influence the [23] jury's determination of guilt or innocence. In other words, applying the Chapman v. California harmless error standard to ineffective assistance of counsel. We agree with that, Your Honor, in one part.

However, we submit that the defense is rushing the harmless error argument too far into the standards. We would submit that what first has to be found is, one, whether or not counsel was not reasonably diligent and conscientious in his representation of the accused. That's what DiCosta goes to. That is the standard that DiCosta sets forth.

The second thing—

THE COURT: Yes, but counsel argues, Mr. Rubenstein argues that here is a case in which there is no witness to a homicide except this defendant. She doesn't know a thing in the world about him. He has got to talk about self-defense. But the self-defense has to be inferred from all the circumstances in the homicide as are produced in the government's case, unless he is to put her on the stand. She would not make, in his judgment, a good witness. Let's assume that that would be the situation.

Her prior record, whatever it was, could be used against her to impeach her. She could be thoroughly discredited. And the government has the burden of proving what happened, and the government is in no position, except by circumstantial evidence, to show that a man who had a knife was not in fact [24] the aggressor in this situation.

Now, that's not an uniformed judgment in my view for defense counsel to make in the context of the facts that are presented. So, he says, "I will not chance having this defendant take the stand. There is nothing that she can really add except to be all twisted up in trying to justify slashing this man," as I said once before, everywhere except on the bottom of his feet. So, he decides not to put her on the stand.

But what is crucial here, and this is what Mr. Rubenstein is talking about, is that if he had followed up on even a suspicion that since the man had a five-inch knife in a sheath—and oddly enough, he had the knife when he was trying to convince his wife to get on the bus to go to work. So, it wasn't just one of these things that he worried about protecting himself back and forth to work or in the room where he lived. But he had that knife. That was part of his paraphernalia. He ordinarily carried it, presumably. That's a logical inference. And a sheath knife, not just a pocket knife but a sheath knife.

Now, what is crucial here is that at least there was a suspicion and that should have been followed up to know more about this decedent. This is the contention of Mr. Rubenstein. One of the contentions that is being made is that, well, did this decedent have a criminal record? What is the nature of the criminal record? And you find out that if he has a criminal [25] record for larceny by trick and things like that, that's one thing. If you decide not to follow up on that by further investigation, that's a reasonable question. But when you come up with a record that indicates that he has been arrested two or three times for assault, assault with a deadly weapon, assault on a police officer, then it is

incumbent, so say the plaintiffs, to follow up on that to the point that you can make an informed judgment.

But whether you have known enough about the decedent to really get involved in his character and reputation, to point it out before the jury, and then to contemplate it by not discovering as a legal proposition that everyone of those convictions is available when the situation is one in which self-defense is the only theory upon which the defendant can defend against the charges —and it is undisputed on the record and the trial counsel's candor makes it plain that although he was suspicious, he did not follow up. And how can I sit here and say that that judgment, erroneous as it was, would not in fact have suggested to this jury either that self-defense in fact had not been disproved, the government had not borne its burden because it is the government's burden to prove the homicide was not committed in self-defense—how can I say that absent that fact that jury might not have been otherwise influenced with respect to the self-defense assertion, which again was all circumstantial? And how can I also not say that that [26] may have been the consideration between second degree and manslaughter? It is not entirely out of the question at all, is it? It is perfectly reasonable, perfectly logical and very difficult of determination.

MR. CLARKE: Your Honor, the government would submit that the Court does not have to make the determination that the Court just indicated. That, we submit, is the fallacy with the defense argument, by rushing the Hall-Missera too fast. The Bruce standards are one aspect. That's a standard to be implied. The overruling, if that's what it be, in DiCosta of Bruce is an overruling not of standards but of burdens, who has the burden of going forward, who has the burden of persuasion and what, to an extend, is that particular burden?

What, we submit, the court has to find in order to grant a new trial in this case is: First, that counsel was not, as DiCosta describes, a reasonably effective, diligent and conscientious attorney.

We would submit right off, Your Honor, that that is not shown by the record in this case; even counsel's mistake of fact as to what the law implies.

But if the Court finds that counsel was not reasonably diligent and effective or conscientious, then the next determination that has to be made is that that error of counsel, whether it be a factual error or a legal error, was such that it blotted out the essence of a defense. Once the Court finds [27] that second part—

THE COURT: Well, you say "blotted out the essence of the offense." But it has to be in the context of the evidence in this case. That is what makes that determination difficult, Mr. Clarke. I don't think there is any argument about the standard that is to be applied.

MR. CLARKE: Well, Your Honor—

THE COURT: I think without question that the trial counsel's candor in this case must lead to a conclusion that he failed to exercise that legal diligence that is ordinarily required. This was a homicide case. This was not a second degree burglary or something like that. This was a homicide case, and you have to start with that proposition.

MR. CLARK: Right.

THE COURT: The person is on trial for a major felony.

MR. CLARKE: Your Honor—

THE COURT: So, I don't think there would be any difficulty in making the findings with respect to that first aspect.

The second is, in the context of this case, the application of broad legal principles to a particular fact situation is what we are involved with here, not just the enunciation of principles. Nobody disagrees really with that.

MR. CLARKE: Well, Your Honor, the government does not have to show beyond a reasonable doubt that the essence of [28] the defense was not blotted out. That is the next standard, the harmless error, the question in Chapman v. California. That's where the reasonable doubt standard applies. The government must only show under DiCosta—even if DiCosta is applied

retroactively—that the essence of a favorable defense was not blotted out. The defense was that of self-defense. Counsel was able to present to the jury all of the facts—

THE COURT: Granted, what you say is true, Mr. Clarke. But if, with respect to that self-defense, one ingredient would reasonable have made that jury make a determination with respect either to self-defense or with respect to the choice between the degrees of homicide, do we not then have a situation, when it is the misinformed judgment of trial counsel; it can't be laid to the feet of the defendant, it can't be laid to the prosecutor, it can't be laid to the Court—whether under those circumstances it would not be in the interest of fairness and justice to this woman to grant her a new trial?

MR. CLARKE: No, Your Honor. We would submit that it is not the situation. It is not whether or not it could reasonably be interpreted by the jury as an element of self-defense. It has to be such that it by its very self would cause, would probably cause the jury to arrive at a different result. And we would submit—

THE COURT: Well, I strongly suggest that that's part of your problem here, because that might well have been the [29] difference between second degree and manslaughter. I do not agree with defense counsel that in the context of the evidence as I heard it, as it was presented to that jury, that the defense of self-defense would have been available to her.

MR. CLARKE: The difficulty with the Court's position, as far as the government is concerned, Your Honor, in that is that throughout the trial the defense took the position and emphatically enforced to the jury by way of argument, that this was an all or nothing situation; that he was not guilty by that. And even after counsel, the original trial counsel, knew or learned of the possibility of the use of a prior record by way of the Burks case, he still took that position, and that is where DiCosta again enters into it. That's an informed decision of counsel, even after he knew of it, that his

strategic position was go for all or go for nothing. Rather than let the jury compromise, push it to them to such an extent that they would let her walk rather than compromise and give her a manslaughter.

We submit, Your Honor, counsel cannot now come in and second guess that decision by counsel, even after counsel, when he was informed of the facts, did make the determination as to which way he would go.

And just to go back to one point, Your Honor, when the Court ruled upon the Brady v. Maryland motion filed by the initial trial counsel in this case, the court by its ruling [30] impliedly found that the failure of the government to produce such evidence was not such that it would result in acquittal or a different determination by the jury, the same standard that we would submit that the Court must apply in the second element of the DiCosta and Bruce combination determination. The Court has already made that one correlation, that one finding.

THE COURT: Well, yes, but I think my finding with respect to Brady did not have to do so much with the fact that if it had not been produced it would not have affected the jury's verdict. It had to do with what the government's burden was in this situation.

MR. CLARKE: Right.

THE COURT: In other words, I found—I believe my recollection is correct with respect to the Brady argument—in this case, that under the circumstances here, there had been no failure on the part of the government to disclose.

MR. CLARKE: That's correct.

THE COURT: Therefore, whether or not it would have affected the jury's verdict was not the consideration that was involved. I believe that's what I said.

MR. CLARKE: That's correct, Your Honor. The point that the government was referring to was a statement by the Court during that hearing as to the effect of the prior violence evidence, basically to the effect that that in no way changes [31] the facts that this decedent was cut everywhere, every which way.

THE COURT: Yes, but I could be wrong. You see, that's where I might be building error in the case. You see, I am the 13th juror in a sense. I don't think it would have affected it one way or the other, but my judgment is not the judgment of an appellate court.

MR. CLARKE: Your Honor, your judgment is the judgment as to the second standard of Bruce and the second standard of DiCosta, whether this was such as to blot out the essence of a fair defense.

The one example of that was Ibarra where the whole defense of illegal seizure was blotted out by counsel's erroneous impression. We don't have that here. The effect of this evidence, in fact, Your Honor, is basically neutral, the evidence that was presented to the jury.

THE COURT: Well, I understand your point. I just wanted to explore it with you fully.

MR. CLARKE: Okay.

THE COURT: And give everybody an opportunity—

MR. CLARKE: May I just make one other point? The position that the defense takes in this case is such that if an error is made by counsel, whether it be of a constitutional issue, whether it be the right to testify, a search and seizure issue or a self-incrimination point, regardless of what type [32] error that be, if an error is made by counsel, that error is now elevated to the constitutional harmless error position, that if counsel had brought it forward and the Court had erroneously ruled on it, it would not be such. We would submit that that's the fallacy of the argument that brings us back to the two-pronged part of Bruce.

Thank you, Your Honor.

THE COURT: Anything further?

MR. RUBENSTEIN: Well, I think the Court understands our argument.

THE COURT: Oh, I usually get the argument of counsel.

MR. RUBENSTEIN: But I just want to clarify that the government was just emphasizing the Bruce standard, and the defense would totally disagree, that it is not the Bruce standard, it is the DiCosta standard. The Court says specifically that—

THE COURT: Well, let me tell you that if everything that a trial counsel does by way of judgment during the course of a trial raises itself to a constitutional standard, we will have no trial counsel. There are informed judgments that have to be made.

You have posed the question. I will take it under advisement and issue the appropriate order.

[33] (Whereupon, at 10:48 o'clock a.m., the above-entitled matter was taken under advisement.)

REPORTER'S CERTIFICATE

Certified to be the official transcript of proceedings.

/s/ Eugene T. Fedoration
EUGENE T. FEDORATION, C.S.R.
Official Court Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed May 7, 1974, James F. Davey, Clerk]

Criminal Number 2081-71

UNITED STATES OF AMERICA

v.

LINDA V. AGURS

ORDER

Defendant LINDA V. AGURS has moved this Court to grant her a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The Government has filed its opposition, and the Court has heard argument of counsel. The reasons particularized in their Memorandum of Points and Authorities in support of the motion, and the affidavit of trial counsel,[1] counsel on appeal contend that Defendant AGURS was denied the effective assistance of counsel guaranteed her by the Sixth Amendment to the Constitution. *See United States* v. *DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973); *Scott* v. *United States*, 427 F.2d 609 (D.C. Cir. 1970); *cf. Powell* v. *Alabama*, 287 U.S. 45 (1932).

In *DeCoster*, the Court of Appeals defined the relevant standard for evaluating claims of ineffective assistance of counsel to be as follows:

> *"a defendant is entitled to the reasonable competent assistance of an attorney acting as her diligent, conscientious advocate."* 487 F.2d at 1202.

[1] Trial counsel, who initially represented Defendant Agurs on appeal, filed a "Motion for Consideration of Appointment of Substitute Counsel for Appellant. That motion was granted by the Court of Appeals. A copy of the motion was attached by Defendant's motion for new trial and has been considered by this Court.

Appellate counsel argue that in preparation for trial, defense counsel failed to "conduct appropriate investigations, both factual and legal, to determine what matters of defense [could] be developed." Id. at 1204. In particular, it is charged[2] that trial counsel failed to conduct adequate investigation into the alleged violent character of the decedent and likewise failed to adequately research the admissability of such evidence. *United States* v. *Burks*, 470 F.2d 432 (D.C. Cir. 1972); *Evans* v. *United States*, 277 F.2d 354 (D.C. Cir. 1960).

Even assuming, however, that trial counsel failed to provide that effective assistance of counsel required in *DeCoster*, *supra*, this Court finds Defendant AGURS was not prejudiced thereby. The testimony of the Government's witnesses, and their cross-examination by defense counsel, squarely presented the issue of self-defense to the jury. The testimony of Messrs. Lawrence Smith, Thomas Henderson, and Sherman Griffin, employees of the tourist home who arrived on the scene shortly after the stabbing, with regard to screams by Defendant AGURS, continued scuffling between defendant and the decedent after they arrived on the scene and possession and control of the knife at that time, is significant in this regard. Equally important is the testimony of Dr. William J. Brownlee, Deputy Medical Examiner, as to the nature of the wounds inflicted upon the decedent. Also, there was testimony from which the jury could have concluded that the decedent regularly carried a weapon and, in fact, may have brought the knife into the tourist home himself.

In addition, defendant suggests that had trial counsel been aware of the decedent's prior convictions, he may well have advised her to testify, that is, that counsel's error may have prejudiced defendant in the exercise of her right to testify in her own defense.

If such were the case, however, trial counsel could have so stated in his motion to substitute counsel,[3] or in his

[2] Trial counsel's statement of facts, which is contained in his motion for appointment of substitute counsel or appeal, is tendered in support of the charges. *See* ? ? ?.

[3] *See* note 1 *supra*.

affidavit. As the Government aptly states, mere "speculation and conjecture on a movent's part cannot require the other party to shoulder the burden of disproving that speculation." [4]

Therefore, upon the above considerations, and upon consideration of the entire record herein, it is this 7th day of May, 1974;

ORDERED that Defendant's motion for a new trial be, and hereby is DENIED.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

Date: May 7, 1974

[4] Government's Opposition at 4.

APPENDIX I

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 2081-71

C.A. No. 72-2072

C.A. No. 73-1956

UNITED STATES OF AMERICA, PLAINTIFF

v.

LINDA V. AGURS, DEFENDANT

AFFIDAVIT OF TRIAL COUNSEL

I, Robert T. Gaston, affirm the following:

As trial counsel for Linda V. Agurs in the case of *United States* v. *Linda V. Agurs*, I did not conduct a factual investigation as the decedent's reputation for violence notwithstanding an indication from a witness to the effect that the decedent might have a prior criminal record for assault. I believed such to be inadmissible unless the defendant had knowledge thereof, and the assistant United States Attorney never presented the decedent's prior record to me as I expected he would if such did in fact exist.

/s/ Robert T. Gaston
ROBERT T. GASTON

State of Md.
Montgomery County

Sworn and subscribed before me this day of February 21, 1974.

/s/ [Illegible]
Notary Public

My commission expires July 3, 1976.

SUPREME COURT OF THE UNITED STATES

No. 75-491

UNITED STATES, PETITIONER

v.

LINDA AGURS

ORDER ALLOWING CERTIORARI. Filed November 17, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 599873 180